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5-25-2016

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Kari E. Hong

*Boston College Law School*, [kari.hong@bc.edu](mailto:kari.hong@bc.edu)

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### Recommended Citation

Kari E. Hong. "From Footnote to Footprint: *Obergefell's* Call To Reconsider Immigration Law as Family Law." *Family Law in Britain and America*, Brill Publishers (2016).

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# FROM FOOTNOTE TO FOOTPRINT: *OBERGEFELL*'S CALL TO RECONSIDER IMMIGRATION LAW AS FAMILY LAW

Kari Hong\*

## INTRODUCTION

During the 40-year debate over whether marriage would be conferred to same-sex couples, conservative scholars lauded the institution of marriage and many liberal scholars were skeptical of the emphasis on and importance of the institution. In June 2015, *Obergefell v. Hodges* unequivocally established that same-sex couples have a fundamental right to marry.<sup>1</sup> Although the decision is a landmark case for LGBT equality, *Obergefell* did not resolve the underlying debate over the continuing purpose of the State remaining involved in the institution of marriage.

This chapter is an engagement with the *Obergefell* decision to suggest one way in which the decision's articulation of the citizen's relationship with the government (or 'the State,' as is the preferred nomenclature among some) is quite groundbreaking. American law—and American values—has a mythical and actual embrace of privacy as a valued and near-inviolable right. The belief that American citizens have a zone of privacy, a right to remain free from government intervention, has captured the imagination of both liberals and conservatives when embracing the rights to abortion, family planning, and gun ownership. However, instead of recognizing the harm that the State can have when intruding on a citizen's fundamental right, *Obergefell* is predicated upon a recognition that some harms—such as humiliation—are inflicted when the State *fails* to intervene and recognize a same-sex couple (and their child) as a family. In a pointed exchange between Justice Kennedy's majority opinion and Justice Roberts' dissent, Justice Roberts criticizes *Obergefell*'s new formulation of privacy to serve as an affirmative rights for a citizen to receive benefits from the State (instead of simply the guarantee to be let alone).

*Obergefell*'s remarkable anointment of privacy as a guarantor of rights is a major departure from the position widely accepted before 2000, and this chapter asks how this newly minted right—or “Obergefell's sword” as phrased by Justice Roberts—might be applied to families in which some members are U.S. citizens and some are not.

## PUBLIC AND PRIVATE FAMILIES AND THE RIGHT FOR FUNCTIONING FAMILIES TO BE LET ALONE

Traditionally, privacy has been viewed as a valued commodity. As Justice Brandeis articulated 100 years ago, the Founders ‘undertook to secure conditions favorable to the pursuit of happiness. . . . They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.’<sup>2</sup> From Man's right to control his home and destiny, American life has been imbued with a sense that an individual's right to privacy is a precondition to achieving

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\* Kari Hong, Assistant Professor, Boston College Law School

<sup>1</sup> *Obergefell v. Hodges*, \_\_\_ U.S. \_\_\_, 135 S. Ct. 2584, 2604 (2015).

<sup>2</sup> *Olmstead v. United States*, 277 U.S. 438, 478–79(1928) (Brandeis, J., dissenting).

freedoms and liberties.<sup>3</sup> The First, Second, Fourth, and Fifth Amendments reinforce the idea that the right to be left alone from the State remains a vital, contemporary protection we receive from our democratic institutions.<sup>4</sup>

It was not long before Woman, such as Catherine MacKinnon, wryly observed that the right of privacy might also become ‘a right of men “to be let alone” to oppress women one at a time.’<sup>5</sup> Marital rape, domestic violence, and child abuse required reexamining the extent to which the ideology of privacy ‘obscure[ed] and foster[ed] inequality and exploitation.’<sup>6</sup> Despite these concerns, the privacy doctrine did very much benefit women and family units. In keeping with Justice Brandeis’ promise, the Supreme Court recognized that constitutional provisions prevented the State from intruding upon familial decisions relating to procreation,<sup>7</sup> abortion,<sup>8</sup> child-rearing,<sup>9</sup> and family formation.<sup>10</sup>

As many have observed, the contemporary reality is that functional—and presumed functioning—families are let alone by the state. A family that possesses either a Man or Money may raise its children with as much confusion and chaos as it pleases. It

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<sup>3</sup> See generally *Olmstead*, 277 U.S. at 478–79 (1928) (Brandeis, J., dissenting) (in dissenting from a decision upholding the government’s collection of evidence by wiretapping, Justice Brandeis observed that “The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man’s spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect, that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth.”). See also Samuel D. Warren & Louis D. Brandeis, ‘The Right to Privacy’, *Harv. L. Rev.* 4, 1890, 193, 205 (in articulating the ‘right to be left alone,’ Warren and Brandeis observed that ‘the protection afforded to thoughts, sentiments, and emotions, expressed through the medium of writing or of the arts, so far as it consists in preventing publication, is merely an instance of the enforcement of the more general right of the individual to be let alone.’).

<sup>4</sup> See, e.g., *American Civil Liberties Union v. Clapper*, 785 F.3d 787, 793 (2d Cir. 2015) (in holding that the NSA’s collection of telephone metadata exceeded statutory authority, the Court opined that: ‘We must confront the question whether a surveillance program that the government has put in place to protect national security is lawful. That program involves the bulk collection by the government of telephone metadata created by telephone companies in the normal course of their business but now explicitly required by the government to be turned over in bulk on an ongoing basis. As in the 1970s, the revelation of this program has generated considerable public attention and concern about the intrusion of government into private matters. As in that era, as well, the nation faces serious threats to national security, including the threat of foreign-generated acts of terrorism against the United States. Now, as then, Congress is tasked in the first instance with achieving the right balance between these often-competing concerns.’)

<sup>5</sup> Catharine MacKinnon, ‘Roe v. Wade: A Study in Male Ideology’, in Jay L. Garfield & Patricia Hennessy (eds), *Abortion: Moral and Legal Perspectives* 45, 53, Amherst: Univ. Of Massachusetts Press, 1984, cited in M. Fineman, ‘What Place for Family Privacy?’, *Geo. Wash. L. Rev.* 67, 1999, 1207, 1217 (discussing feminist critiques of the privacy doctrine).

<sup>6</sup> Fineman, note 5 above at 1216.

<sup>7</sup> *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>8</sup> *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833 (1992); *Roe v. Wade*, 410 U.S. 959 (1973).

<sup>9</sup> *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

<sup>10</sup> *Michael H. v. Gerald D.*, 491 U.S. 110 (1991); *Moore v. East Cleveland*, 431 U.S. 484 (1977) (extending familial protects protections afforded to caretakers to grandparents raising children).

is only the disruption of divorce,<sup>11</sup> poverty,<sup>12</sup> and abuse<sup>13</sup> that invites—and compels—the State to intervene.

But what if it is not the State intervention that is in fact the problem? Stated another way, what if the problem of regulating, policing, and punishing public families arises from the biases seeking conformity to a normative ideals but not the vehicle of State intervention, standing by itself? I will return to this question after noting the transformative nature of *Obergefell*'s conception of harm arising from a State's failure to intervene in the zone of privacy.

### **OBERGEFELL'S SWORD: RETHINKING STATE HARM AS ARISING FROM NO STATE INTERVENTION**

Much has been written about the triad of *Griswold v. Connecticut*, *Eisenstadt v. Baird*, and *Roe v. Wade*, but the right to privacy has taken on new qualities in the marriage equality movement. Beginning in *Lawrence v. Texas*, it was the right to be let alone that paved the way for *Obergefell*'s recognition of same-sex marriage. *Lawrence* begins with the precise pronouncement that 'Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home.'<sup>14</sup> It is this predicate formulation of privacy that leads to the abolition of state laws criminalizing what is otherwise consensual, intimacy between adults.

Twelve years later, when establishing that marriage is a fundamental right that must be conferred to same-sex couples, *Obergefell* cited to *Lawrence* a dozen times to support its reasoning and result.<sup>15</sup> But importantly, *Obergefell* articulated a new intrusion of the State, which is not regulation or punishment of private choices. Rather, the harm inflicted on those from whom marriage is withheld is 'the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied.'<sup>16</sup>

Privacy is no longer a carved out realm, a space apart from the State's views in which individuals may order their lives in peace. Rather, Justice Kennedy articulates a

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<sup>11</sup> See M.A. Fineman, *The Neutered Mother, the Sexual Family, and Other Twentieth Century Tragedies*, New York: Routledge, 1995 (defining 'public families' as those in which the mother-father-child triad is missing, specifically, when a man is absent from a family, the family is subject to surveillance, regulation, and punishment).

<sup>12</sup> Khiara Bridges, 'Privacy Rights and Public Families', *Harv. J. L. & Gender* 24, 2011, 113, 118–19 ('[I]t is poor women's and families' poverty that subjects them to the suspension of the rights to privacy. . . . [T]he reliance on the welfare state (for medical services or otherwise) makes 'public' even the family that has managed to fulfill heteronormative ideals.').

<sup>13</sup> *Hodge v. Jones*, 31 F.3d 157, 168 (4th Cir. 1994) (rejecting a civil right challenge to a state's records of suspect child abusers on the basis that the plaintiff parents 'have not demonstrated a violation of any federal constitutional or statutory right of familial privacy. The confines of that right were not so clearly established that, even if Defendants' acts did impinge the Hodge family's zone of privacy, they could objectively or reasonably have known that their conduct violated the Due Process Clause.').

<sup>14</sup> *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

<sup>15</sup> *Obergefell*, 135 S. Ct. at 2600 (Roberts, J., dissenting).

<sup>16</sup> *Ibid.*

privacy right that demands that the State remove itself from public expressions that inflicts humiliation and stigmatization onto others. In so doing, the State then must arbitrate values and affirmatively protect those who are vulnerable to non-legal and intangible injuries. The State suddenly becomes a guarantor of affirmative benefits.

In his dissenting opinion, Justice Roberts strongly objects to *Obergefell*'s new definition of privacy. In objecting to the conclusion that recognition of same-sex marriage is required by the constitution, he observes that '[n]either *Lawrence* nor any other precedent in the privacy line of cases supports the right that petitioners assert here.'<sup>17</sup> Justice Roberts notes that '[u]nlike criminal laws banning contraceptives and sodomy, the marriage laws at issue here *involve no government intrusion*. They create no crime and impose no punishment. Same-sex couples remain free to live together, to engage in intimate conduct, and to raise their families as they see fit. No one is "condemned to live in loneliness" by the laws challenged in these cases—no one.'<sup>18</sup> Justice Roberts affirms that 'the laws [limiting marriage to opposite-sex couples] in no way interfere with the "right to be let alone."'<sup>19</sup> To again emphasize the perceived break that *Obergefell* makes from prior precedent, 'petitioners do not seek privacy. Quite the opposite, they seek public recognition of their relationships, along with corresponding government benefits. Our cases have consistently refused to allow litigants to convert the shield provided by constitutional liberties into a sword to demand positive entitlements from the State.'<sup>20</sup>

*Obergefell* is important because for the first time, the privacy doctrine is no longer a means to let people alone. The harm imposed on same-sex couples by the State is not the harm envisioned by Justice Brandeis. It was not an unwanted intervention in the sacred realm that caused injury, but rather, the State's *lack of intervention* that inflicted the harm on the couple. Under the guise of privacy, State intervention then becomes a powerful tool to obtain needed benefits and protections.

## **EXTENDING *OBERGEFELL*'S SWORD TO IMMIGRATION**

Predicated on the *Obergefell*'s proactive privacy right, I explore then how State intervention can be a means to create more public families and more families subject to State intervention.

It seems counterintuitive to want this. Why would anyone want to invite the State into their personal affairs, casting judgments on, and policing conduct relating to what they should or should be doing? But the reality is that many private families, individuals who are fully functioning, are in need of the benefits of State intervention that are currently only provided to public families, those who are subject to government policing and supervision. To provide two concrete examples in the immigration context, the parent/child relationship and marriage illustrate how State intervention is a counterintuitive means to protect the harm facing certain families.

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<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

<sup>20</sup> Ibid.

## Rethinking Immigration Law As Family Law

Family law can—and should—have a transformative impact on how Congress recognizes and defines which family members will be admitted into the country. I am not the first person to make such a suggestion. To the contrary, there is a significant and growing conversation of scholars who are exploring the intersection of family and immigration law—Famigration, if you will—and highlighting such areas how child custody determinations are shaped by immigration status<sup>21</sup> and how immigration status is conferred (and restricted) based on the parent-child and marital relationships.<sup>22</sup> Scholars are also engaging in a vital normative discussion, positing how family law can alter some procedural protections and substantive aspects of immigration law. ‘Thinking of immigration law as family law . . . reveals the extent to which it is out of step with deeply held societal values and, in some instances, constitutional principles.’<sup>23</sup>

The bold attempt to reform U.S. immigration policies with the judicial tools of substantive due process or family law’s best interests of the child defining doctrine is not unthinkable. Other countries have relied on family law doctrines to stop the deportation of a child’s parents. Both Australia and Canada require a deportation proceeding against a non-citizen parent to consider the impact that any state action would have on the best interests of the parent’s child, as that term is defined by international treaties.<sup>24</sup> Although not yet recognized by U.S. courts, the conversations about Famigration are timely and

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<sup>21</sup> David B. Thronson, ‘Custody and Contradictions: Exploring Immigration Law As Federal Family Law in the Context of Child Custody’, *Hastings L.J.* 59, 2008, 453, 510, 512–13 (‘‘When a parent’s unauthorized status is the result of an immigration system that fails to take the best interests of children into account and denies agency to children, incorporating consideration related to and arising from the parent’s status would validate not only immigration law’s conclusion about the parent’s status but also the premises and system that led to that conclusion.’’); Kerry Abrams, ‘Immigration Status and the Best Interests of the Child Standard’, *Va. J. Soc. Pol’y & L.* 14, 2006, 87, 88 (‘What this essay does do is to identify the analytic problems with the Rico court’s treatment of immigration status, and to use the case as an opportunity to consider how courts and legislatures could improve the way in which they consider immigration status in child custody cases.’).

<sup>22</sup> Shani M. King, ‘U.S. Immigration Law and the Traditional Nuclear Conception of Family: Toward A Functional Definition of Family That Protects Children’s Fundamental Human Rights’, *Colum. Hum. Rts. L. Rev.* 41, 2010, 509, 513; Stephen H. Legomsky, ‘Rationing Family Values in Europe and America: An Immigration Tug of War Between States and Their Supra-National Associations’, *Geo. Immigr. L.J.* 25, 2011, 807, 816; Bridgette A. Carr, ‘Incorporating A “Best Interests of the Child” Approach into Immigration Law and Procedure’, *Yale Hum. Rts. & Dev. L.J.* 12, 2009, 120, 123–24, 159.

<sup>23</sup> Thronson, note 21 above at 510; Carr, note 22 above at 159 (querying how the best interests of the child doctrine can be employed in the asylum and hardship contexts to recognize the interests of a child in the adjudication of a non-citizen parent’s immigration status).

<sup>24</sup> See *Minister of State for Immigration & Ethnic Affairs v. Teoh* (1995) 183 C.L.R. 273, 289 (Austl.) (holding that the phrase ‘actions concerning children’ encompasses a parent’s immigration proceeding, particularly where the parent’s primary argument involves the hardship to his or her children); *Baker v. Canada* [1999], 2 S.C.R. 817 (holding that the Convention’s ‘best interests of the child’ principle was relevant to interpreting the deportation statute, despite the lower court’s holding that ‘deportation of a parent was not a decision “concerning” children within the meaning of [A]rticle 3’ of the Convention).

urgent. In the light of the fact that 18 years have passed without meaningful immigration reform, searching in family law for potential remedies is not at all a misplaced journey.<sup>25</sup>

In the United States, immigration law began and operated as an arm of foreign policy. From the Chinese Exclusion Act to the Cold War's encouragement of defectors, Congress determined which nationals were excluded and which ones were embraced. Federal courts, through the plenary power doctrine, permitted Congress to make its immigration policies without interference on what it viewed as sensitive matters of international relations. But immigration law cannot be viewed as simply a part of international diplomacy. Since the 1980s, the (purported) civil proceedings of immigration law began to police, detain, and criminalize some of the non-citizens who lived in the United States. Crimmigration scholars named these pernicious forces and responded by calling for extra constitutional protections found in criminal law to be imported to immigration courts. *Padilla v. Kentucky*—the Supreme Court's 2010 case announcing that a criminal defense attorney's effective representation must include providing a non-citizen client with accurate information about the immigration consequences of a criminal conviction—is the most recognizable success of these efforts.<sup>26</sup>

It is undeniable that immigration law is family law. It is no exaggeration to say that immigration law is family law. Under present policies, two-thirds of all legal immigrants receive status through a family relationship.<sup>27</sup> Congress has prioritized family unity by permitting the spouses and children of citizens to enter the country and receive residence without wait times or numerical limitations.<sup>28</sup> Children born to citizen parents receive birthright citizenship.<sup>29</sup>

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<sup>25</sup> In 1996, Congress passed Illegal Immigration Reform and Immigration Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996) (IIRIRA). IIRIRA significantly altered the nature of immigration law by focusing on restricting and limiting those who are eligible for relief. In a dramatic break from the modern immigration laws, first established in 1952, IIRIRA has relied on numerous procedural and substantive changes to exclude a large number of non-citizens who had otherwise been eligible to remain in the United States. For instance, those with minor, and even serious, criminal convictions who had been eligible to remain in the country are no longer able to do so. . . . The current crimes are also retroactive in effect, which means that many individuals who were convicted and served their sentences years ago, are newly vulnerable to removal even though the offense did not have serious, or even any, immigration consequences at the date of the conviction. Kari E. Hong, 'Removing Citizens: Parenthood, Immigration Courts, and Derivative Citizenship', *Geo. Immigr. L.J.* 28, 2014, 277, 310.

<sup>26</sup> *Padilla v. Kentucky*, 559 U.S. 365 (2010)

<sup>27</sup> USCIS statistics. 20% is from employment, 10% asylum, and rest from other remedies such as cancellation of removal.

<sup>28</sup> Immigration and Nationality Act 8 U.S.C. § 203 (2006).

<sup>29</sup> This issue is made complex by Congress's decision, in 1986, to change the derivative citizenship statute to require proof of a blood relationship between an unwed father and a child. See Immigration and Nationality Act Amendments of 1986, Pub. L. 99-653, 100 Stat. 3655 (codified as amended at 8 U.S.C. § 1409(a)(1) (2012)). For children born after November 14, 1986, they must follow the requirement of this statute and establish a genetic link to any unwed father. For children born on or before November 14, 1986, a child may 'elect to have the pre-amendment [8 U.S.C. § 1409(a)] apply,' which required only legitimation before age 21. *Miller v. Albright*, 523 U.S. 420, 426 n.3 (1998). There are numerous policy arguments to amend the statute and eliminate the dispositive nature of genetics in determining parentage. However, in a pernicious turn of events, immigration courts are interpreting the old law--that does not have a biology requirement-- to somehow implicitly incorporate the new statute's blood requirement. See

Today's immigrants are not simply those who (like my own grandparents and great-grandparents) were existing families of foreign nationals, emigrating together with their worldly belongings packed in one trunk propelling them to either Ellis or Angel Island. Modern travel—and the Internet—has introduced a way in which love can transform an intended vacation into a serendipitous encounter in which a U.S. citizen will now seek to marry or parent a person who was born abroad. As a result, many of today's immigration decisions are not about foreign nationals. To the contrary, the decision to order someone deported most often implicates the question of whether a citizen parent, child, or spouse will be separated from a loved one.

### **Institutional Forces That Interfere With An Impartial Adjudication of Family Law In Immigration Court Proceedings**

Federalism in family law is a rich and controversial topic. Some scholars embrace the supremacy of state family law,<sup>30</sup> some articulate compelling arguments for federal uniformity,<sup>31</sup> some argue that federal law has acted as an invisible hand in regulating some specific family law matters in the areas of taxation, immigration, and society security,<sup>32</sup> and some debate whether family law federalism is in fact even real.<sup>33</sup>

Understudied in these debates is a specific context in which the conflicting laws are resolved (or not resolved as the case may be). Turning to immigration, for decades scholars have been investigating the myriad ways by which family law and immigration law overlap, diverge, and conflict with one another.<sup>34</sup> But these inquiries overlook that

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[Martinez-Madera v. Holder](#), 559 F.3d 937, 942 (9th Cir. 2009) where the petitioner was born in 1953, entitling him to the benefit of the pre-1986 statute. The Board of Immigration Appeals ("BIA") and the Ninth Circuit ruled against the petitioner because he was legitimated by his stepfather, without any blood relations, under California law. Of note, the Ninth Circuit affirmed the biological requirement based on its mistaken reliance on the post-1986 statute: *Ibid.* at 940, n.1. In oral argument in a different case, Judge Kimberly Wardlaw noted that mistake. Oral Argument at 13:33, [Anderson v. Holder](#), 527 F. App'x 602 (9th Cir. 2013).

<sup>30</sup> June Carbone, 'Marriage As A State of Mind: Federalism, Contract, and the Expressive Interest in Family Law', *Mich. St. L. Rev.* 2011, 49, 60 ('With no clear method for determining to which community a particular marriage or family belonged, domestic relations law became preoccupied with convoluted problems in the conflict of laws. . . . At the same time, the compromise was struck at the state level because, as the last section established, family values have never been uniform enough to allow a national approach.'). Lynn D. Wardle, Tyranny, Federalism, and the Federal Marriage Amendment, 17 *Yale J.L. & Feminism* 221, 224 (2005).

<sup>31</sup> See Naomi R. Cahn, Family Law, Federalism, and the Federal Courts, 79 *Iowa L. Rev.* 1073, 1075 (1994)

<sup>32</sup> See Anne L. Alstott, Commentary Family Values, Inheritance Law, and Inheritance Taxation, 63 *Tax L. Rev.* 123 (2009); Clare Huntington, The Constitutional Dimension of Immigration Federalism, 61 *Vand. L. Rev.* 787, 792 (2008)

<sup>33</sup> Courtney G. Joslin, 'Federalism and Family Status', *Ind. L.J.* 90, 2015, 787, 814 ('Perhaps one of the reasons that the myth of family law federalism is so resilient is that it appears to make things easier. . . . Once the myth of family law's inherent localism is dispelled, one is then left with a set of more complicated questions that, to date, have largely been overlooked. If Congress is not precluded from acting, should it act, and if so, when and how?').

<sup>34</sup> David B. Thronson, Custody and Contradictions: Exploring Immigration Law As Federal Family Law in the Context of Child Custody, 59 *Hastings L.J.* 453, 510, 512-13 (2008); Shani M. King, U.S. Immigration



immigration and citizenship law do not deploy a unique, federal definition of family law. To the contrary, since at least 1949, the Board of Immigration Appeals (BIA)—the agency tasked with interpreting immigration laws—has expressly deferred to state family law in determining various family relationships.<sup>35</sup>

In this respect, abstract discussions over whether the federal government has a legitimate disagreement with state law definitions of immigrant families glosses over salient, institutional problems that citizens and their non-citizen family members encounter: Rather than rendering a decision over a legal issue within their expertise, immigration judges have to grapple with the complexities of family law while facing political and workload pressures that favor removal for reasons quite other than the application of family law.<sup>36</sup>

Unlike their federal court counterparts, immigration judges are handling nearly three times as many cases (1200 per year versus 480 per year processed by a district court judge) without the same level of clerical and administrative support.<sup>37</sup> Immigration judges are tasked with applying the federal statutes and regulations governing

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Law and the Traditional Nuclear Conception of Family: Toward A Functional Definition of Family That Protects Children's Fundamental Human Rights, 41 Colum. Hum. Rts. L. Rev. 509, 513 (2010); Stephen H. Legomsky, Rationing Family Values in Europe and America: An Immigration Tug of War Between States and Their Supra-National Associations, 25 Geo. Immigr. L.J. 807, 816 (2011); Bridgette A. Carr, Incorporating A "Best Interests of the Child" Approach into Immigration Law and Procedure, 12 Yale Hum. Rts. & Dev. L.J. 120, 123-24, 159 (2009)

<sup>35</sup> See, e.g., *Wedderburn v. INS*, 215 F.3d 795 (7th Cir. 2000). When adjudicating a derivative citizenship claim, Judge Easterbrook observed that 'federal law may point to state (or foreign) law as a rule of decision, and this is how the INS has consistently understood these terms.' *Ibid.* at 799. In deferring to state family law, the Ninth Circuit explained that 'because there is no federal law of domestic relations, that necessarily means a separation recognized by state law .... [O]ur approach accords with the INS's long standing policy of looking to state law to determine questions of family relations, specifically marriage and custody'. *Minasyan v. Gonzales*, 401 F.3d 1069, 1076-77 (9th Cir. 2005)..

<sup>36</sup> Robert Katzmman, Judge, U.S. Court of Appeals for the Second Circuit, Immigration and the Courts, Remarks at Roundtable Discussion at the Brookings Institution 49 (Feb. 20, 2009) [hereinafter Brookings Institution Panel] (transcript available at [http://www.brookings.edu/~media/events/2009/2/20%20immigration/20080220\\_immigration.pdf](http://www.brookings.edu/~media/events/2009/2/20%20immigration/20080220_immigration.pdf)) ('[W]hile recognizing the real problems in the system, we shouldn't forget those immigration judges who are doing outstanding jobs, and, unfortunately, they get tarnished when there are these instances of those immigration judges who are not performing ....').

<sup>37</sup> It is estimated that in 2013, 40% of individuals in immigration court did not have counsel. See Erin Kelley, 'Immigration Judges Call for Reform', *USA Today* (August 27, 2014, 5:58 PM), <http://www.usatoday.com/story/news/politics/2014/08/27/immigrationjudgesreform/14704039/>. The immigration judges have a larger caseload with less help than their federal court counterparts. As of 2009, each immigration judge heard approximately 1200 cases each year, which requires the judge to hear and decide, on average, one hundred cases each month at a rate of five cases each day of the week. Such a degree of efficiency is unusual for courts. A federal district judge, by contrast, considers and decides 480 cases each year, at a rate of forty cases each month and just over one case per day. In addition to the smaller number of cases, federal district courts have the benefit of at least two law clerks that assist each judge. In the immigration court system, four immigration judges share one law clerk. See Stephen H. Legomsky, 'Restructuring Immigration Adjudication', *Duke L.J.* 59, 2010, 1635, 1652; Dana Leigh Marks, 'An Urgent Priority: Why Congress Should Establish an Article I Immigration Court', *Bender's Immigr. Bull.* 13, January 1 2008, 3, 14; Brookings Institution Panel, note 35 above, at 7-8 (statement of Russell Wheeler, Visiting Fellow, Brookings Institution).

immigration law, which is described as a highly technical area of law, unwieldy, complex, and dense. When questions of state family law arise, the immigration judge is required to properly learn and apply a new area of law, which could arise from any of the 50 states. Although judges are capable of mastering new subjects and novel claims, the immigration judges must do so without the benefit of attorneys presenting the complex issues (40 per cent of immigrants do not have counsel). Whereas a federal judge has at least two clerks to assist with research, four immigration judges share one clerk.<sup>38</sup>

The government prosecuting attorneys (called trial attorneys) seeking the removal of a non-citizen are not necessarily invested in faithful—or accurate—applications of family law. In derivative citizenship claims, a child who has been legitimated by a citizen parent—as that relationship is defined by state family law—is deemed a citizen at birth, even when if such determination happens when the person is now an adult. When arguing that a man named Gary Anderson did not meet those definitions, the Ninth Circuit recently called out the Government’s attorney inconsistent and conflicting interpretation of state law: ‘In other words, the government’s position is that the word “legitimation” should be read broadly when a broad reading results in the denial of citizenship, and narrowly when a narrow reading results in the denial of citizenship.’<sup>39</sup> Not only was the government attorney’s argument inconsistent (and irrational) in the case before it, but the Ninth Circuit noted that its interpretation of the state law ‘defies the government’s own prior assertion that the statute at issue in [three other cases that had been brought to federal courts].’<sup>40</sup> Although this is but one example, the government attorney’s complete disregard for the right application of family law must give pause to making parallels to federalism questions in other fields in which there are questions of abstention, conflict of laws, and comity.<sup>41</sup>

Unique to other administrative judges, immigration judges lack independence from the prosecutors arguing cases before them.<sup>42</sup> The prosecutors appearing in immigration courts are employees of the Department of Justice and answer to the Attorney General. Likewise, the label ‘judge’ in the title ‘immigration judge’ is a misnomer. An immigration judge is in fact neither an Article I nor Article III judge. Rather, they are lawyers who also are employees of the Department of Justice. The Attorney General is not a neutral arbiter between his employees (the prosecutor seeking removal and the immigration judge adjudicating a case). Rather, the Attorney General

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<sup>38</sup> Ibid.

<sup>39</sup> *Anderson v. Holder*, 673 F.3d 1089, 1100 (9th Cir. 2012).

<sup>40</sup> Ibid.

<sup>41</sup> *Younger, Burford, Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 815–16, 96 S. Ct. 1236, 1245, 47 L. Ed. 2d 483 (1976); see Anthony J. Bellia Jr., ‘State Courts and the Making of Federal Common Law’, *U. Pa. L. Rev.* 153, 2005, 825, 845; Evan H. Caminker, ‘Why Must Inferior Courts Obey Superior Court Precedents?’, *Stan. L. Rev.* 46, 1994, 817, 818 (‘[L]ongstanding doctrine dictates that a court is always bound to follow a precedent established by a court “superior” to it.’); Frederic M. Bloom, ‘State Courts Unbound’, *Cornell L. Rev.* 93, 2008, 501, 554.

<sup>42</sup> Dana Leigh Marks, ‘An Independent Immigration Court Is Needed’, Room for Debate, *N.Y. Times* (July 12, 2011), <http://www.nytimes.com/roomfordebate/2011/07/12/how-can-the-asylum-system-be-fixed/an-independent-immigration-court-is-needed> (‘The National Association of Immigration Judges believes that establishment of an independent agency or Article I court (like the tax or bankruptcy courts) rather than the current placement of the courts within the Department of Justice, is an essential reform.’).

has issued regulations preventing immigration judges from holding prosecutors in contempt of court under the reasoning that the immigration judges are in fact DOJ lawyers on equal footing with the immigration court prosecutors.<sup>43</sup>

The lack of independence of the immigration judge from the prosecutor is not hypothetical concern. In the past, the job security of immigration judges has been conditioned on whether they are ordering enough people removed from the country. In 2002, Attorney General John Ashcroft, fired one-third of the Board of Immigration Appeals (BIA) because their approval rates (permitting non-citizens to stay) were above the Board average. (Not surprisingly, since 2002, the denial rate of the BIA rose from 59 to 93 per cent.)<sup>44</sup>

Any meaningful inquiry as to whether immigration law reaches different outcomes from family law over the meaning of “spouse,” “parent”, and “child” must then start with these institutional forces that distort adjudications of that very question.

### **Rethinking State Intervention: GALs As A Test Case**

The new immigrant family—being comprised of at least one citizen member—and the institutional forces in immigration law—that tip towards removal rather than faithfully applying family law—demand that immigration law no longer be left alone under the plenary powers doctrine.

Returning to public families, much has been observed about the disparate treatment of intact, nuclear families versus the other families, made public through their perceived deviance of disruption. Underlying these criticisms has been the assumption that State intervention has been to the public families’ disadvantage. The unspoken assumption has been that a family’s right to be let alone is ultimately a desired state to which all families normatively should belong.

But again, to ask the question asked before, what if it is not the State intervention that is in fact the problem?

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<sup>43</sup> ‘Immigration judges cannot hold federal prosecutors from the Department of Homeland Security in contempt of court because the judges are considered to be lawyers working for the Justice Department. . .’. Marks, note 41 above, at 3–4 (‘At present, the Attorney General, our nation’s chief prosecutor in terrorism cases, acts as the boss of the judges who decide whether an accused non-citizen should be removed from the United States. At the same time, despite the creation of the DHS and the placement of trial-level immigration prosecutors there, the Attorney General continues to supervise a critical element of the prosecution process, the Office of Immigration Litigation (OIL), which defends immigration cases on behalf of the government in the circuit courts of appeals. This conflict of interest between the judicial and prosecutorial functions creates a significant (and perhaps even fatal) flaw to the immigration court structure, one that is obvious to the public and undermines confidence in the impartiality of the courts.’).

<sup>44</sup> The Attorney General fired the BIA judges who had decided in favor of non-citizens at higher rates than the Board’s average. See Brookings Institution Panel, note 35 above, at 22 (statement of Professor Andrew I. Schoenholtz, Georgetown University Law Center); see also Marks, note 41 above, at 14 (criticizing an internal Department of Justice investigation into immigration judges decisions because, ‘with the clear memory of the not-too-distant personnel purge at the BIA,’ the investigation had a ‘decidedly chilling effect on Immigration Judges’).

By way of example, immigrant children who are unaccompanied minors—those whose parents are either not in the United States or, if present, are incapable of providing care—have existing protections under immigration and family law.<sup>45</sup> These children are outside of the traditional family. True to the family privacy doctrine, without a parent, the federal government intervenes with a set of rules and procedures that shepherds the children from family court to immigration court, securing legal status. Specifically, these children are appointed guardians ad litem (GALs) in immigration court, advocates who are the critical link in obtaining status for the undocumented children.

GALs are truly a creature of a family law. Their powers are broad but not clearly defined. Their purpose is to serve the best interests of the child, a nebulous definition that is akin to the prosecutor's duty to simply do justice. Their duties are to advocate for a child, but cut off before and after the judicial proceeding at issue. The pliability of such a role permits individualized decisions to be rendered based on the fact-specific circumstances of the situation facing the child.

To date, Congress has expressly provided the appointment of GALs for non-citizen children who have no adults in the United States who can care for them. It is the state intervention that gives the unaccompanied child a right to receive public benefits for food, shelter, and education. The legal status gives the child a right to work and an ability to remain in the country. In this context, the public status of the child is the way by which the child goes from unlawful foreigner without food, shelter, and income, to an admitted member of American society, capable of obtaining the means and ways that lead to self-sufficiency (and arguably self-realization). Why not provide GALs to citizen children whose parents are in immigration proceedings? These citizen children are not at risk for deportation, but their parents are. The reality is that then the minor children face the choice of being separated from their parents or remaining together at the expense of having substantially lessened life opportunities in a country that is foreign to the child.

Instead of only having immigration law weigh in on the equities of the parent's status, why shouldn't family law be able to evaluate the impact that the deportation of a non-citizen parent will have on a citizen child? When it is shown that the citizen child will be worse off in the country of the parent's origin, it is time to recognize that the harm facing a citizen child may not simply be from neglect or abuse. To the contrary, the most irreparable harm that some citizen children may face may be from the federal government effectuating a deportation order against his or her parents.

The most notable benefits of GALs who appear in immigration proceedings is that they will provide counsel to the parents of citizens who are otherwise not represented. From data compiled over the past decade, the presence of counsel is a significant factor in non-citizen's ability to remain in the United States. In cases involving unaccompanied

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<sup>45</sup> '[A]bandoned, abused, and neglected child migrants [may qualify for] . . . "Special Immigrant Juvenile Status" (SIJS). This benefit, which is a pathway to legal permanent residence and citizenship, is the only area within federal immigration law that requires a state court to take action in order for immigration authorities to consider an individual's eligibility for relief.' Laila L. Hlass, 'States and Status: A Study of Geographical Disparities for Immigrant Youth', *Colum. Hum. Rts. L. Rev.* 46, 2014, 66. The estimated size of this population is approximately 1,120,000 children. *Ibid* at 274 & n.37.

minors, those with attorneys were granted relief 73 per cent of the time and ordered removed 27 per cent of the time. In cases without representation, those children were ordered removed 85 per cent of the time and granted relief 15 per cent of the time.<sup>46</sup>

In the child welfare context, private attorneys are appointed in adoptions in which a state agency is terminating a parent's rights. But in private adoptions, the parties usually must fend without counsel. States such as Massachusetts have recognized that 'the same fundamental, constitutionally protected interests are at stake' in both types adoptions and have thus ordered the appointment of counsel to all.<sup>47</sup> Extending GALs then to immigration proceedings has a foundation.

However, sometimes under immigration law, the welfare of the citizen child is irrelevant to the question of whether the non-citizen parent is eligible for status. In those situations, why cannot the GAL serve as the means by which the citizen child can enjoin the enforcement of a removal order against his or her parents. In 1998, the Fifth Circuit recognized a critical exception to *Donovan v. City of Dallas*'s anti-injunction rule, contemplating a circumstance when state proceedings may in fact enjoin federal ones.<sup>48</sup> Given that GALs would simply enjoin the enforcement of the deportation order until the child is 18 rather than extinguish it, this too appears to be a potential remedy available to citizen children whose parents are without immigration status.

Citizen children with undocumented parents do not receive the same child welfare protections that arriving foreign nationals do. They do not, because they are part of intact, functioning families in which their parents are married, able to financially support them, or both. But for immigration, the citizen children are members of families deserving of privacy. But the very privacy doctrine that leaves these intact, functioning families alone has left them fully vulnerable from needed and existing child welfare protections that may stop the parents' deportations.

For this reason, the cloak of privacy is no gift at all to citizen children whose parents are without status. For those residing in these mixed-status families, it is the State intervention that is needed to level the imbalance present in immigration court.

## CONCLUSION

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<sup>46</sup> <http://trac.syr.edu/immigration/reports/371/>.

<sup>47</sup> *In re Adoption of Meghan*, 461 Mass. 1006, 1007, 961 N.E.2d 110, 113 (2012); see also Michael Levenson, 'Court Stresses Rights of Adoptees in Contested Cases', *Boston Globe* August 27, 2015 at <https://www.bostonglobe.com/metro/2015/08/26/probate-chief-orders-review-adoption-cases/9eVmVDElOTIROonUSn6KnO/story.html> (discussing court order for 'all pending private adoption cases be reviewed to ensure that children at the center of those disputes have attorneys appointed to represent their interests.').

<sup>48</sup> *Donovan v. City of Dallas*, 377 U.S. 408 (1964); *Munich Am. Reinsurance Co. v. Crawford*, 141 F.3d 585, 596 (5th Cir. 1998) ('[S]tate laws regulating the business of insurance may suspend federal remedies based on conflicting federal statutes—here, the FAA.'). Alan D. Hornstein & P. Michael Nagle, 'State Court Power to Enjoin Federal Judicial Proceedings: *Donovan v. City of Dallas* Revisited' *Wash. U. L. Rev.* 60, 1, 3 (1982) ("there is no federal constitutional ban on state court injunctions against federal proceedings, pending or impending, once a state equity court determines that the federal court lacks jurisdiction").

Citizen children—those in the functioning families—are left alone and as a result fend for themselves, against an oppressive federal system seeking to separate or exile the non-citizen parent from the United States. It is these children, those who are part of a functioning family that lack the needed protection of critical state laws that do help similarly-situated children in public families.

Famigration—the indelible link between domestic family law and immigration law—offers the potential to transform the way in which immigration law operates. For decades, Congress has directed immigration decisions to be based on substantive state family law’s definitions of spouse, parent, and child. Now with *Obergefell*’s heightened protections, the right to be let alone can be remedied by a right to intervene.